

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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EDUARDO LI,	:	15-CV-06099 (RJD)
	:	
Plaintiff,	:	
	:	
-against-	:	United States Courthouse
	:	Brooklyn, New York
	:	
CERTAIN UNDERWRITERS AT	:	Monday, December 21, 2015
LLOYD'S, LONDON, ET AL.,	:	11:00 a.m.
	:	
Defendant.	:	
	:	

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TRANSCRIPT OF CIVIL CAUSE FOR ORDER TO SHOW CAUSE  
BEFORE THE HONORABLE RAYMOND J. DEARIE  
UNITED STATES SENIOR DISTRICT JUDGE

A P P E A R A N C E S:

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1 (In open court.)

2 (Judge RAYMOND J. DEARIE enters the courtroom.)

3 THE COURTROOM DEPUTY: All rise.

4 THE COURT: Good morning.

5 ALL: Good morning, Your Honor.

6 THE COURTROOM DEPUTY: We are on this morning for an  
7 Order to Show Cause and a pre-motion conference.

8 This is Li versus Certain Underwriters, Docket  
9 Number 15-CV-6099, assigned to Judge Dearie and Magistrate  
10 Judge Orenstein.

11 Can I ask the attorneys please to note their  
12 appearance beginning with counsel for plaintiff.

13 MS. COHEN: Thank you.

14 Robin Cohen from Kasowitz Benson representing  
15 Mr. Li, the plaintiff here.

16 MR. GARSON: Burt Garson, also from Kasowitz,  
17 Benson, Torres & Friedman, representing Mr. Li.

18 THE COURT: Good morning.

19 MS. COHEN: Good morning, Your Honor.

20 MR. GARSON: Good morning.

21 MR. SCHEIFFER: Good morning, Your Honor.

22 David Scheiffer representing defendant, Underwriters  
23 at Lloyd's and Axis, Wilson Elser.

24 MS. MURPHY: Good morning, Your Honor.

25 Margaret Murphy from Wilson Elser as well.

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1 MR. MEER: Jonathan Meer, Wilson Elser.

2 THE COURT: All right. We have got the full team  
3 out.

4 Well, you know, this is just what I need as I begin  
5 to grapple with this monster of an indictment, to have this  
6 and presumably other defendants, dealing with questions of  
7 coverage, but be that as it may.

8 I take it, Mr. Li does not stand alone. Chances are  
9 he is going to have company in this dispute, in this sort of  
10 dispute.

11 MS. COHEN: Well, Your Honor, he might, but  
12 depending upon what Your Honor does could lead to settlement  
13 discussions with the carriers, which could resolve it all. I  
14 think this could be an example of how we could proceed with  
15 the other defendant, potentially.

16 THE COURT: There was a comment in the carrier's  
17 papers that I thought maybe, I am told the story without  
18 saying so. I think you made a comment that Mr. Li has hired  
19 any number of people, a prominent Costa Rican law firm and a  
20 third lawyer as well.

21 MR. SCHEIFFER: Yes, and that goes to, very  
22 significantly since the supplemental indictment, there are  
23 putative insureds under this policy from all over the world.  
24 There are investigations, we understand, in Costa Rica now and  
25 there has been an open investigation in Switzerland for some

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1 time so --

2 THE COURT: You just have to read the paper to know  
3 that.

4 MR. SCHEIFFER: That's right.

5 And the prospect of international litigation,  
6 obviously, is a concern here. There is the prospect that  
7 absent the enforcement of the forum selection and choice of  
8 law provisions that Underwriters and FIFA could be subject to  
9 jurisdiction in multiple jurisdictions.

10 THE COURT: I guess that is true. We are getting a  
11 little ahead of ourselves. You did not concede the point, but  
12 you almost did, the jurisdictional point.

13 Given the way Lloyd's is constructed, it is almost  
14 inevitable -- if not, in fact, the case -- that I do not have  
15 diversity jurisdiction here.

16 MR. SCHEIFFER: Your Honor, I think -- first let me  
17 say Steve Harvey said it best last night after crowning the  
18 wrong Miss Universe: My apologies, an honest human error.

19 We do think that there is an issue with subject  
20 matter jurisdiction. As best as we can drill down, our side  
21 is all foreign nationals or foreign entities. Mr. Li is a  
22 Costa Rican resident and a citizen. We did understand  
23 incorrectly that he did maintain a residence in Florida. We  
24 confused it. We do not believe that there is supplemental  
25 jurisdiction here. We think the Stein case is very much on

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1 point and my apologies to everybody for creating quite an  
2 interesting legal conundrum, but one that we should have  
3 avoided.

4 THE COURT: Let me just give you some thoughts so  
5 that maybe we can sort of structure this.

6 Stein is, obviously, a strong precedent in your  
7 favor and may rule the day, but let us assume that I find a  
8 way around it in the hopes of getting these disputes resolved,  
9 because they are not going to interrupt or delay my criminal  
10 case. Period, end of discussion.

11 And that puts everybody in a trick bag, including  
12 the carrier if the carrier withholds coverage.

13 Let us assume I find a way to exercise ancillary  
14 jurisdiction. What about the forum selection clause?

15 MS. COHEN: Your Honor, the law is clear that with  
16 respect to a nonsignatory to the contract --

17 THE COURT: It is not so clear to me.

18 MS. COHEN: Well, Your Honor --

19 THE COURT: He wants benefits and yet he is not  
20 going to be bound by the terms. That is what I struggle with.

21 MS. COHEN: Sure.

22 Your Honor, under Swiss law, which was in existence  
23 at the time the contract was executed, under Swiss law, it is  
24 clear that a nonsignatory is not bound or not within the scope  
25 of the choice of law provision. And the leading case on point

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1 is SFIP. That is a seminal case that has been discussed and  
2 been quoted to across Europe. And the holding is that unless  
3 Mr. Li actually had knowledge of and consented to the choice  
4 of law provision, he is not bound by it.

5 And under the Second Circuit decision in Martinez,  
6 Your Honor, the court in that case said that involves the  
7 interpretation of the choice of law provision, and you look to  
8 Swiss law to determine that. And so the question is whether  
9 Mr. Li falls within the scope of that clause.

10 And I don't even believe that counsel will dispute  
11 that under European law, whether you look at the Lugano  
12 Convention or the Brussels Convention, which was the basis of  
13 the Lugano Convention, or the law that has interpreted the  
14 precise provision, it is clear that Mr. Li is not bound or  
15 falls within the scope of that choice of law provision.

16 I know that's different, Your Honor, than some  
17 New York Federal Court decisions, but that is the clear law in  
18 Europe that was in existence at the time the policies were  
19 executed.

20 THE COURT: I understand your point.

21 Yes?

22 MR. SCHEIFFER: Your Honor, we don't agree  
23 necessarily. And let's assume for a minute the Lugano  
24 Convention -- because Mr. Li is not a signatory and he's not a  
25 resident of a member state -- doesn't apply.

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1           Mr. Brant's declaration and Mr. Li's entire argument  
2 centers upon the application of the Lugano Convention. They  
3 do not address, as my Swiss counsel has advised me, either  
4 what they call the VVR -- I won't even try to pronounce the  
5 German name for it they use -- which, as you may know  
6 Switzerland is a Napoleonic Code country, is the law governing  
7 insurance contracts. That statute is very clear in that under  
8 article 101, article 16 and 17, that a third-party under an  
9 insurance contract must accept all the benefits and  
10 obligations of that contract. I think the law in the U.S. is  
11 the same.

12           What they are not addressing is the private law of  
13 contracts, which holds that a third-party is bound by a forum  
14 selection clause and a choice of law clause to which the  
15 parties have agreed. Mr. Brant doesn't address any of that.  
16 The only court that has addressed the Lugano Treaty in that  
17 case, in the Western District of Pennsylvania, enforced the  
18 forum selection clause.

19           THE COURT: Well, bear with me just a second.

20           Do you agree that we apply Swiss law?

21           MR. SCHEIFFER: Swiss law applies by the contract,  
22 Your Honor. The contract was negotiated, executed and issued  
23 into Switzerland. Even under common choice of law provisions,  
24 it's Swiss law; whether it's the restatement or any other  
25 rules that would apply, it is Swiss law.

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1 THE COURT: And the case you cite?

2 MS. COHEN: SFIP along, Your Honor, with the Lugano  
3 Convention, which they even concede controls here.

4 What happened, Your Honor, in their papers, is they  
5 referred to a section in the Lugano Convention that does not  
6 deal with insurance contracts. There is a particular section.

7 THE COURT: I am aware of that.

8 MS. COHEN: Yes.

9 THE COURT: In the weaker party section.

10 MS. COHEN: It's the weaker party section  
11 Your Honor, absolutely right. And, in fact, in the Lugano  
12 Convention, it's protocol 2 that we cite to the Court.  
13 Protocol 2 specifically says that the Lugano Convention is  
14 based upon the Brussels Convention and the Court should give  
15 due regard to the European court of justice decisions relating  
16 to that. And that, Your Honor, is the SFIP case.

17 THE COURT: Okay.

18 Now, let me ask you this. Who says it would take so  
19 long to resolve it in the Swiss court?

20 MS. COHEN: Your Honor, their own certification that  
21 they provided to the Court from a Swiss counsel said it would  
22 take 369 or 364 days to get this issue, the advancement of  
23 defense costs resolved. Our expert says it will take three to  
24 four years.

25 But it doesn't matter which expert you look at. The



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1 reason we're before the Court and the reason that this is so  
2 important is our client is now presently in jail and the  
3 advancement of defense costs is critical to get this sort of  
4 defense.

5 THE COURT: That, I understand. That is an easy  
6 one.

7 The question is: Do I have jurisdiction, what law  
8 applies, and do I have to defer to the Swiss court?

9 MS. COHEN: Your Honor, if I may because I want --

10 MR. SCHEIFFER: Well --

11 THE COURT: Nobody cuts anybody off, just relax.

12 MS. COHEN: Thank you, Your Honor.

13 Your Honor referred to the Stein case and the  
14 factors in the Stein case that dictate whether this Court  
15 should exercise ancillary jurisdiction, and we completely  
16 agree. And in that case, the court said what you do is you  
17 weigh the prejudice to the nonmoving party against the  
18 efficiencies for this court to resolve the matter.

19 Now, they can't show any prejudice here because they  
20 removed the case to Your Honor. So there is zero prejudice to  
21 them.

22 THE COURT: Well, they removed it to get rid of it,  
23 but that is a different story.

24 MS. COHEN: That's a different story, Your Honor,  
25 but they did remove it.

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1           So under Stein, it's zero for prejudice and then  
2 it's ten for efficiencies.

3           The reason they removed it to Your Honor is because  
4 Your Honor was handling the underlying criminal proceeding and  
5 no one can dispute, either the London market or the plaintiff,  
6 that the issues are interrelated. And one in particular that  
7 I think can exemplify how interrelated they are, the  
8 defendants have alleged that they want to reserve their right  
9 to later recoup the defense costs if, in fact, Mr. Li is found  
10 to willfully intend the conduct.

11           THE COURT: That is in the policy.

12           MS. COHEN: Right.

13           The best person to decide that issue is Your Honor,  
14 who actually presided over the proceeding; and so with respect  
15 to the willful intent, that the underlying issues and the  
16 coverage issues are interrelated.

17           THE COURT: Wouldn't the jury decide that?

18           MS. COHEN: Well, the jury will decide that, but  
19 then it will be for Your Honor to decide, based upon what the  
20 jury said, does the willful intent exclusion apply? That's  
21 just one example of how the issues are interrelated.

22           The other thing which came out in United States  
23 versus Weissman, which was a case almost identical to this  
24 case where the court was deciding whether to exercise its  
25 ancillary jurisdiction against a nonmoving party who had an

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1 obligation to advance costs. The judge there said that this  
2 is the exact time that a court should assert ancillary  
3 jurisdiction and the reason is, while Your Honor is not  
4 deciding the costs of the defense in the underlying  
5 proceeding, you are deciding the conduct of that defense.

6 THE COURT: Well, I mean, it makes perfectly good  
7 sense to me that I get a chance to resolve this so that it  
8 does not become a stumbling block toward individuals securing  
9 representation for the case before me. But it made perfectly  
10 good sense in Stein, too. It did not convince the Circuit.

11 MS. COHEN: The difference in Stein was three-fold,  
12 Your Honor.

13 In Stein, you had a nonmoving party that was forced  
14 into Federal Court. Here, they're the ones that removed it,  
15 so that's one difference.

16 In Stein, the court found that there wasn't  
17 likelihood of success on the merits because the contract was  
18 based upon an implied contract, which was based upon one  
19 payment back in 1974. Here we have an actual written contract  
20 that requires them to advance defense costs.

21 And three, the difference in Stein was, Your Honor,  
22 there was an arbitration provision. There was an issue  
23 whether the issue between the former employer, which was the  
24 company --

25 THE COURT: I am familiar with it.

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1 Do those differences matter in terms of what the  
2 court held on the particular question? I forget the language,  
3 but it is a world away from this situation where in the  
4 context of a criminal case -- granted, it is not quite the  
5 context we are in right now -- I am called upon to decide a  
6 dispute regarding a nonparty in a civil matter. They said  
7 ix-nay. That is essentially what I have here.

8 MR. SCHEIFFER: Your Honor --

9 MS. COHEN: It --

10 THE COURT: Relax, I am not going to cut you short,  
11 you are going to get all the time in the world.

12 Go ahead.

13 MS. COHEN: Thank you, Your Honor.

14 It cited United States versus Weissman, which is  
15 almost identical to this case with approval because the court  
16 looked at that case and said it was at a critical stage, and  
17 in that case, the court found that the Federal judge did  
18 properly exercise its jurisdiction.

19 THE COURT: Weissman was on the eve of trial.

20 MS. COHEN: Weissman, I actually think it was right  
21 after the jury verdict, Your Honor, when the judge was  
22 deciding the post-trial thing.

23 THE COURT: Okay. You are right.

24 MS. COHEN: But the bottom line, Your Honor, is our  
25 case is much stronger than United States versus Weissman. And

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1 the reason our case is stronger is, they voluntarily removed  
2 it here. They can't argue prejudice under Stein.

3 THE COURT: You are going to run that flag up that  
4 pole as often as you can. I get your point.

5 Sir.

6 MR. SCHEIFFER: Your Honor, we removed the case. We  
7 didn't know who it was going to, so let's stop that.

8 Stein is really an interesting case and every case  
9 that the plaintiffs rely upon for arguing ancillary  
10 jurisdiction or supplemental jurisdiction involves a party  
11 directly involved in the criminal abdomen. KPMG was an  
12 unnamed co-conspirator and was specifically a targeted  
13 defendant until the indictment was filed. That's not the case  
14 here.

15 The Stein decision is very clear. The court  
16 actually wrote: While we do not exclude the possibility of a  
17 legitimate ancillary proceeding involving a nonparty to the  
18 other action where we find the law is clear that the  
19 circumstances will be rare.

20 The court went on to say that it's an ordinary  
21 contract action involving KPMG and they dismissed the claim  
22 against KPMG, remanded on writ for other reasons. But they  
23 were very clear and they went through several considerations.

24 We're not on the eve of trial. Every single case  
25 where a court has exercised ancillary jurisdiction in some

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1 type of fee dispute has involved counsel. This is a civil  
2 contract action.

3 We removed the case. We wrote Your Honor a letter  
4 very promptly when we realized that this was a question and  
5 were concerned that the Court would be divested of  
6 jurisdiction. Time to remand had expired. No request for  
7 remand was made.

8 Several months have expired since this action was  
9 filed and it was not until the reply papers any hint that  
10 there was imminent harm. So the prejudice issue is clearly  
11 not obvious. Federal is paying. There's a million-and-a-half  
12 left on their policy.

13 THE COURT: That is going to go down the drain in  
14 short time.

15 MR. SCHEIFFER: Could be.

16 THE COURT: If not days or hours.

17 MR. SCHEIFFER: Could be. But Your Honor brought up  
18 a very significant point to begin with, and in their papers  
19 they say inconsistent results could be a reason to have this  
20 one discrete plaintiff here, this one putative insured.

21 There are a number of individuals that are making  
22 claims against the FIFA policy. Some based in Europe, some  
23 based in South America. I think there are two in the  
24 United States now, okay. So this could be all over the world.

25 And yes, Swiss law is different. And we talked

1 about this because none of the materials put before the Court  
2 talk about what would happen under Swiss law in this situation  
3 simply as a matter of contract. Even if apart from Lugano.  
4 And Lugano was enforced by another court in this country for  
5 removal. And I alluded to it earlier.

6 I will just read you a section of the private law of  
7 contracts.

8 Article 5: The private law of contracts: In  
9 matters involving an economic interest, parties may agree on a  
10 court that will have to decide any potential or existing  
11 disputes out of a specific legal relationship.

12 That is the governing law in Switzerland, and my  
13 understanding is, consistent throughout most of Europe that  
14 follow the private law of contracts, Germany being another  
15 state.

16 Article 17 of the VVG, and, Your Honor, I have  
17 enough trouble with New York sometimes, going to Louisiana and  
18 the Napoleonic Code states. It's very difficult. The VVG is  
19 a statute that governs the law of insurance throughout many  
20 different European nations. Switzerland has specifically  
21 adopted it. It has nearly 200 different articles.

22 Article 17 specifically authorizes FIFA as the owner  
23 of the policy to enter into both a choice of law contract  
24 agreement and a forum selection clause.

25 Article 16, 116 of the private law of contracts

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1 governing in Switzerland, specifically holds that in order for  
2 a nonsignatory to a contract to obtain the benefits of that  
3 contract, they must consent and agree to the obligations of  
4 that contract. No different than the law here. No different  
5 than the law here.

6 THE COURT: But contrary to the law cited to me at  
7 the outset of our discussions, which is purportedly Swiss law  
8 relative to the specific.

9 MR. SCHEIFFER: I'm sorry, Your Honor.

10 THE COURT: Contrary to the law cited to me by your  
11 colleague here at the outset, relating specifically to  
12 insurance contracts. So how do we reconcile that?

13 MR. SCHEIFFER: Third-party -- they are not a  
14 third-party beneficiary of the contract. They're just a  
15 nonsignatory to the contract.

16 Under the VVG, a party who qualifies as an insured  
17 person under which they claim the right to coverage is bound  
18 by the terms and conditions of the contract.

19 Now there is an issue whether he even qualifies as  
20 an insured person because of capacity.

21 THE COURT: Yes, I read it, but I am not -- the  
22 likelihood is you are going to lose on that point.

23 MR. SCHEIFFER: Okay. All right. So FIFA feels  
24 differently, okay?

25 THE COURT: Of course.



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1 MR. SCHEIFFER: Okay. But what's the worse case  
2 scenario here, Your Honor? What's the worse case for  
3 everybody in this room?

4 This is a defense cost only issue. It's a criminal  
5 action. We don't pay fines, we don't pay penalties. There's  
6 been efforts to have insurance have third-parties serve jail  
7 time. We know that's not going to work.

8 But let's assume for a minute that this case gets  
9 decided by this Court and we think under Stein, and everything  
10 I've read, Your Honor alone holds the obligation under 1446 to  
11 decide whether or not you keep this case. I had no ability to  
12 ask for relief.

13 What happens if we reverse? What happens if we take  
14 an appeal, and the Second Circuit follows Stein in our view?  
15 And overturns Your Honor's decision on jurisdictional basis.  
16 We think they would.

17 They're free to go ahead back to Switzerland.  
18 They're free to participate. They've been invited into  
19 conversations that Ms. Cohen alluded to. They could go back  
20 across the street. They elected to stay in this court.

21 Now, in their papers they note that if the willful  
22 misconduct exclusion applies, under the terms of the policy,  
23 we have a right of recoupment.

24 How do we enforce that?

25 THE COURT: Not if you don't pay it.

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1 MR. SCHEIFFER: That's right.

2 Or if an injunctive bond is posted to protect our  
3 future interests. And that's a possibility. We didn't push  
4 for that relief because, obviously, if we go to the  
5 Second Circuit and this case gets kicked, it would -- we would  
6 request leave to appeal.

7 I don't have authority to waive that at this point.  
8 But we think if those considerations are taken into account on  
9 an application for injunctive relief, there is severe  
10 prejudice to the defendants here because they not only face  
11 the prospect of litigating in multiple courts, but they also  
12 face the prospect of sometime in the future, could be three  
13 months, could be six months, could be a year, that the  
14 remaining 1.5 million of the Federal policy becomes exhausted.  
15 Not imminently.

16 We tell us what the burn rate is. But that policy  
17 was issued to CONCACAF during which time Mr. Li had full  
18 authority to act. He has made a claim under that policy and  
19 he's being paid under that policy. Federal has not made a  
20 demand on our clients for contribution or participation, as of  
21 yet.

22 So Mr. Li immediately targeted the Federal policy as  
23 a primary policy to pay his defense costs. Where is the  
24 imminent harm?

25 THE COURT: Okay.

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1 MR. SCHEIFFER: Even at a burn rate of 150,000 a  
2 month, we could be out sick months or we could be out a year.

3 THE COURT: 150,000 a month. Boy.

4 MR. SCHEIFFER: Well, that's what they're claiming.

5 MS. COHEN: Your Honor, I think my counsel's  
6 argument crystallize --

7 THE COURT: You know what I really want to know? I  
8 want to know the under story. What is really going on? How  
9 does this serve anyone's interest not to get this resolved?

10 MS. COHEN: Your Honor, if I may? Exactly.

11 And he said what is the worse case scenario? His  
12 own Swiss counsel's certification is the worst case scenario.  
13 We cannot get this issue resolved in front of a Swiss court  
14 for another 364 days. They don't have the procedural  
15 mechanism for a complex case to give preliminary relief with  
16 respect to advancement of defense costs.

17 So if counsel is correct, the worse case scenario is  
18 that the Chubb policy is gone within the next month, because  
19 now we have five defendants who are accessing that coverage.  
20 Mr. Li, who is sitting in jail, has no ability to pay his  
21 defense costs. Defense is definitely disrupted in this  
22 proceeding.

23 THE COURT: He has no ability because he is in jail?  
24 You are saying he has no resources.

25 MS. COHEN: He has no resources, Your Honor, and he

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1 has -- in light of Your Honor's --

2 THE COURT: That is not in the papers. It is not in  
3 the papers to say if I cannot draw down on this policy, I will  
4 be limited to Federal defenders. Not necessarily a bad  
5 alternative, I might add.

6 MS. COHEN: Two reasons, Your Honor. It's in light  
7 of the bail, he is in jail, he cannot post the bail, number  
8 one.

9 THE COURT: Okay.

10 MS. COHEN: So he does not have the access. He  
11 can't wait --

12 THE COURT: He does not have the access -- he cannot  
13 access whatever assets he has, is that what you are telling  
14 me?

15 MS. COHEN: I think it's more than that, Your Honor.  
16 We have the underlying counsel here. I don't believe he has  
17 the assets to fund his own defense. That is why, Your Honor,  
18 we filed this preliminary injunction.

19 We've got a policy that's about to exhaust. Mr. Li  
20 does not have the assets to defend himself. We've got a  
21 policy that expressly states that they have to advance defense  
22 costs as they are occurring, and Your Honor, the bottom line  
23 is, the worst case scenario is this scenario.

24 We will not, if we have to go to the Swiss court --

25 THE COURT: Is that a legitimate -- I understand the

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1 concern and practical aspects of it.

2 MS. COHEN: Sure.

3 THE COURT: But is that factor a legitimate concern  
4 in the jurisdictional location?

5 MS. COHEN: I believe it is, Your Honor.

6 I believe, Your Honor -- first of all, it's a very  
7 discretionary standard and under Stein, you look at the  
8 prejudice to the nonmoving party, you look at the efficiencies  
9 of handling both, and you look at the prejudice to the Mr. Li  
10 of this world.

11 THE COURT: The prejudice to him would be, assuming  
12 you are correct about his own financial picture, would be his  
13 inability to hire counsel of his own choosing.

14 MS. COHEN: Or to have his counsel continue to  
15 defend him at the critical stage. Mr. Li was just extradited,  
16 Your Honor, as you know, to Brooklyn. He is now in jail. He  
17 does not have the assets to defend himself.

18 THE COURT: Do we have any counsel of record?

19 Ellie, has anybody filed a notice on behalf?

20 THE COURTROOM DEPUTY: No. I don't believe so,  
21 Judge Dearie, not to this particular defendant.

22 MS. COHEN: Okay. And Your Honor, that would mean  
23 that the disruption of counsel clearly touches on Your Honor's  
24 original jurisdiction. That is, to make sure that the  
25 proceedings go smoothly, make sure that Mr. Li is adequately

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1 represented. We believe all of those factors are important in  
2 determining whether Your Honor should exercise ancillary  
3 jurisdiction.

4 And I really think, and I know I've harped on this,  
5 Your Honor, I think it's important. Mr. -- Counsel.

6 THE COURT: He chose the forum.

7 MS. COHEN: He chose the forum here. And now he's  
8 saying and this is really what I wanted to get across.

9 Defendants are playing games, and let me explain --  
10 and I think it's an important consideration for Your Honor to  
11 consider.

12 They deny paying the defense costs based on the RICO  
13 exclusion. That was a meritless defense and they themselves  
14 have abandoned it.

15 Now, after we filed the suit, after we filed the  
16 papers, they now have asserted two additional defenses that  
17 are also meritless. There is no question on the merits they  
18 should be paying the defendant costs.

19 So what happens now? They move it to Your Honor,  
20 and only after Your Honor decides that you're going to move  
21 this case and your magistrate sets a scheduling order, all of  
22 a sudden, experienced counsel discovers that Your Honor  
23 doesn't have jurisdiction.

24 And now, instead of saying you know what, we should  
25 both agree that Your Honor has ancillary jurisdiction. I'm

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1 now going to delay it even further, because if Your Honor  
2 exercises that jurisdiction, I'm going to now bring it before  
3 the Second Circuit, knowing full well we can't get any relief  
4 for over a year on a claim that they clearly should be paying  
5 the defense costs.

6 All of that smells bad, Your Honor. It just does,  
7 on every single level.

8 THE COURT: Okay. I got your point.

9 MR. SCHEIFFER: May I?

10 THE COURT: Of course.

11 MR. SCHEIFFER: Well, let's talk about mistakes and  
12 errors.

13 We removed the case under adversity jurisdiction.  
14 Absolutely, we think there's a question there now. We  
15 notified the Court well before Magistrate Orenstein directed a  
16 conference, or issued a scheduling order.

17 What happened during that time?

18 One, the 30 days for counsel to examine the basis  
19 for our removal elapsed. Once that occurred, we cannot agree  
20 to ancillary jurisdiction. We can't stipulate to jurisdiction  
21 in this court. The law is pretty clear on that.

22 THE COURT: Yes.

23 MR. SCHEIFFER: Okay.

24 We brought it to Your Honor's attention. Mr. Li's  
25 counsel did not ask for remand. They asked for you to examine

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1 the question of ancillary jurisdiction. That's fair. They  
2 elected that.

3 We don't agree necessarily that the Court has  
4 ancillary jurisdiction. We would have accepted a remand, no  
5 problem.

6 THE COURT: You would not have gotten the remand.  
7 You would have gotten dismissal, but in any event.

8 MR. SCHEIFFER: Right. Like I said, Mr. Harvey said  
9 it best, honest human error.

10 The Court's now been asked to examine its  
11 supplemental jurisdiction. Lead case, Exxon versus Mobil,  
12 U.S. Supreme Court made very clear that it's very limited.  
13 Whether it's pendant-party or the term ancillary, the statute  
14 is using the term supplemental now.

15 We think Stein is very clear that it would be very  
16 rare. There has to be some direct relationship in a criminal  
17 action. We have no direct relationship.

18 You talk about prejudice. Is Mr. Li being  
19 prejudiced? Counsel brought on an Order to Show Cause for  
20 injunctive relief several months after the case was first  
21 filed. Several months. Mr. Li, yes, was arrested by Swiss  
22 authorities at the request of the United States. He has been  
23 fighting extradition during all that time.

24 When the application was brought before Your Honor,  
25 no mention is made of the fact that the Federal policy is



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1 paying. We were able to discern that from Thompson Heinz --  
2 Thompson Heinz? No, Squire Patton. I always confuse the two  
3 for some reason.

4 And, of course, being in the insurance industry, I  
5 knew who to call. Okay.

6 So we knew immediately there was no imminent harm  
7 and, yes, Your Honor, we did withdraw the RICO exclusion, but  
8 the reasons for that are subject to the settlement privilege.  
9 Efforts were made and efforts are ongoing between FIFA and  
10 others, and if Ms. Cohen is not aware, they were, in fact,  
11 invited to a seat at the table. They've declined so far, is  
12 my understanding.

13 What is the prejudice here? As Your Honor so  
14 astutely pointed out, and I was very questioned, what is  
15 Mr. Li's personal ability to pay his defense costs? My  
16 experience is people who rise to that level of international  
17 prominence are generally people of means, unless their assets  
18 are seized prior to their arrest on a forfeiture order or a  
19 seizure order. That has not occurred here, to my knowledge,  
20 as least.

21 Yes, the Swiss courts are different. They are  
22 slower in certain respects, and even if we take the 365 day  
23 that my counsel one-year rule, during all of this time Mr. Li  
24 had Swiss counsel and did not file. So he's wasted almost six  
25 months of that one-year period. Never raised it. Never

1 addressed it. Even with the benefit of Swiss counsel.

2 Now underwriters are being asked under an ancillary  
3 jurisdiction approach to be in the United States when their  
4 named insured, which under Swiss law has certain rights, has  
5 questioned and objected to the coverage here. Counsel says  
6 our other two theories under the policy that deny coverage are  
7 baseless. I'm not going to go into capacity since you've  
8 already told me what you think, okay? Beg the exception for  
9 appeal.

10 THE COURT: I did not rule on it. I am just giving  
11 you my reaction to the papers.

12 MR. SCHEIFFER: I know, I know. But we also have  
13 limited coverage to investigation on criminal matters, and  
14 nowhere in their papers do they dispute the sound,  
15 well-established law that once the indictment is filed, it  
16 turns from an investigation to prosecution.

17 Now, it is clear that those wordings are in there  
18 for a reason. They distinguish between civil defense and  
19 criminal defense.

20 THE COURT: Can I just interrupt you there for a  
21 minute. You make the point in the papers and I stumbled over  
22 it.

23 Insurance coverage shall also include defense costs  
24 incurred to defend any actual or alleged wrongful actions and  
25 also investigation costs, being the reasonable, et cetera.

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1 MR. SCHEIFFER: Right.

2 THE COURT: All right.

3 MR. SCHEIFFER: But there's a separate criminal  
4 cover provision.

5 THE COURT: All right. Where is that?

6 MR. SCHEIFFER: I'd have to pull it, Your Honor.

7 MS. COHEN: Your Honor, it's 2.4, Your Honor.

8 THE COURT: Okay. 2.4.

9 MR. SCHEIFFER: 2.4 says investigation.

10 THE COURT: I understand. It defines investigation?

11 MR. SCHEIFFER: No, it does not, Your Honor.

12 THE COURT: What does it say?

13 MR. SCHEIFFER: It simply says that they will pay  
14 defense costs arising from a criminal investigation.

15 MS. COHEN: That's not what it says.

16 MR. SCHEIFFER: Unlike typical U.S. D&O policies  
17 that often pay defense costs for prosecutions -- and this is  
18 all tied to capacity -- it's 2.4, Your Honor.

19 THE COURT: What could be clearer defense costs.

20 MR. SCHEIFFER: It says 2.4. Criminal defense costs  
21 limited cover.

22 If a breach of duty in accord with clause one,  
23 subject matter of insurance, investigative proceedings are  
24 initiated with the provisions of the criminal law, or the law  
25 concerning infringement regulations or disciplinary law of

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1 codes of professional conduct, the insurer will pay for the  
2 cost of defense of these proceedings.

3 Loss event shall mean a request to the insured  
4 person to testify, the initiation of investigative  
5 proceedings, or the initiation of a private lawsuit, including  
6 conciliation proceedings.

7 Actual criminal prosecution is not mentioned  
8 anywhere in this limited cover provision, Your Honor.

9 THE COURT: I must say, this insurance business is  
10 confounding.

11 MR. SCHEIFFER: Your Honor, I won't disagree with  
12 you more. It keeps me in business.

13 MS. COHEN: Your Honor, if I may.

14 The policy could not be any clearer that it covers  
15 not only investigative costs, but defense costs. If you go to  
16 1.1 --

17 THE COURT: I just read 1.1.

18 MS. COHEN: Yes. And 1.10 talks defense costs  
19 relating to extradition proceedings.

20 And 2.4 says once, if there's an investigation, then  
21 the carrier has to pay all of the defense costs.

22 MR. SCHEIFFER: It doesn't say that.

23 MS. COHEN: When you look at the provisions all  
24 together, it is clear and unambiguous that the London market  
25 must pay for both defense costs and investigative costs.

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1           And the best proof of that, Your Honor, is when we  
2 provided notice to them -- which by the way, when we provided  
3 notice to them, we instantly and immediately told them about  
4 the Chubb policy, and that it was a limited asset -- when they  
5 declined coverage, they didn't come back and say, oh, by the  
6 way, this policy only covers investigative costs.

7           THE COURT: Okay. Let me ask a question.

8           Why did you decline coverage?

9           MR. SCHEIFFER: Why didn't we?

10          THE COURT: Why did you?

11          MR. SCHEIFFER: The initial Swiss counsel believed  
12 that the RICO exclusion alone was sufficient. They issued a  
13 general reservation of rights, which, as I'm sure Your Honor  
14 is aware, is sufficient to allow us to raise anything else  
15 going forward.

16          But let me ask a question --

17          THE COURT: No, no, finish the answer.

18          MR. SCHEIFFER: No, but they decline under the RICO  
19 exclusion because the predicate acts in the indictment --

20          THE COURT: But that is off the table, is it not?

21          MR. SCHEIFFER: Well, apparently, during this  
22 application, a supplemental indictment with the same facts  
23 against Mr. Li are pled supersedes the original indictment.

24          All the predicate acts in both indictments, and we  
25 only picked it up on our own, are based upon the same

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1 predicate acts, all of which occurred before he became a  
2 member elect of the -- I forget what the exact term they call  
3 it -- but basically the governing body of FIFA. He was only  
4 in advisory committee roles prior to that.

5 That's exactly why the policy does have that  
6 managerial supervisory wording in it, because of the great  
7 breadth of the number of advisory committees that this  
8 organization has.

9 But --

10 THE COURT: He was on standing committees, was he  
11 not?

12 MR. SCHEIFFER: Yes. They are advisory committees.  
13 I understand one he was on was player relations. So they give  
14 advice based on those issues. They don't have direct  
15 authority. Policy making decisions stand with the senior  
16 committee.

17 THE COURT: All right.

18 MR. SCHEIFFER: But we have a specific, not a  
19 general clause here, that has very specific limitations upon  
20 criminal defense cover and specific must govern over general  
21 in any contract.

22 THE COURT: Well, I think it is pretty specific when  
23 it says insurance will cover all defense costs incurred in  
24 defending any actual or alleged wrongful acts. That is pretty  
25 specific.

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1 MR. SCHEIFFER: That's 1.1, Your Honor.

2 THE COURT: That is right.

3 MR. SCHEIFFER: Read 2.4 where it has a specific  
4 limitation on defense costs for criminal conduct. That is  
5 where the limitation to investigate comes from.

6 THE COURT: I am just curious why it would not say  
7 subject to the provisions of 2.4.

8 But in any event, 2.4.

9 (Pause in the proceedings.)

10 THE COURT: I read it, but so what? Lots of  
11 investigations don't spawn the need to defend.

12 MR. SCHEIFFER: But the courts throughout this  
13 country recognize the distinction between a criminal  
14 investigation and a prosecution.

15 THE COURT: Sure.

16 MR. SCHEIFFER: Okay. That's why we have that in  
17 here.

18 We, in fact -- FIFA is, in fact, has other parties  
19 under investigation in Switzerland who clearly provide a  
20 subject to coverage. Senior members, governing board. Those  
21 defense costs are being paid, I understand, because it is an  
22 investigation without objection by FIFA. FIFA has objected to  
23 it this.

24 THE COURT: So bad news, double bad news, you have  
25 been indicted, number one. And number two, you do not have

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1 any coverage anymore.

2 MR. SCHEIFFER: This is the contract they bought,  
3 Your Honor.

4 THE COURT: Well, I do not know.

5 MR. SCHEIFFER: If we're going to talk about  
6 enforcement of contract provisions, if we were to only look at  
7 2.1, and 1.1, that would render this provision meaningless.

8 MS. COHEN: Your Honor, if I may.

9 2.4 was to make clear that it includes both defense  
10 costs and investigative costs. And counsel keeps on  
11 representing to this Court that there are all these cases that  
12 somehow substantiate the representations that he has made to  
13 you today.

14 First of all, it's not in his briefs at all and the  
15 reason it's not in the briefs, is because those cases,  
16 Your Honor, do not exist. And as to counsel's representations  
17 as to what Swiss law is, or what it stands for, none of that,  
18 Your Honor, is in the brief.

19 What is in the brief, and what counsel has conceded,  
20 is that Swiss law controls whether Mr. Li falls within the  
21 scope of that provision. And under Swiss law, and under the  
22 SFIP decision, which is the seminal case that's been cited  
23 throughout Europe, a nonsignatory like Mr. Li does not fall  
24 within the scope of that provision. And if he doesn't fall  
25 within the scope, under the Lugano Convention, his choice of



1 forum controls.

2 And coming back to the 800-foot level, Your Honor,  
3 at the end of day, if Your Honor does not exercise ancillary  
4 jurisdiction, after defendants remove to Your Honor, we will  
5 have no ability to get the relief we need, or the policy that  
6 is clearly covered. We will have to wait over a year, and as  
7 a result of that, Mr. Li's defenses or defense will be  
8 interrupted in this criminal proceeding.

9 And so under Stein, I know that counsel --

10 THE COURT: That is not literally true, because we  
11 are going to proceed in the criminal proceeding and we are  
12 going to have -- he is going to have defense of some sort or  
13 another.

14 Are you content with the state of your filing as to  
15 the issue of irreparable harm?

16 MS. COHEN: I am, Your Honor. But if this Court  
17 feels it needs a certification from Mr. Li to make it clear he  
18 will suffer irreparable harm, we will provide it.

19 And let me tell you, Your Honor, why we did not.  
20 First, we thought because Mr. Li was in jail, that would be a  
21 sufficient evidence. But really why we didn't provide it,  
22 Your Honor, is the decision in the In Re: *WorldCom* case.

23 Judge Cote, like Your Honor, had both the underlying  
24 case and the coverage case, and she looked at irreparable  
25 harm. And she said the fact that there might be another

1 source of income does not alleviate the irreparable harm. And  
2 it really was a policy argument, which she said in the  
3 decision is you don't look in the particular director, you  
4 look at the directors as a group. And it is a policy of this  
5 state to make sure that there is good corporate governance in  
6 the corporations throughout the country.

7 And what she said, in order to do that, you have to  
8 make sure that good men and women will serve on boards, and  
9 the only way you can do that is if defendants like the London  
10 market step up to the plate and advance costs as they're  
11 required to do.

12 So, in that case, she was very clear that you do  
13 not, meaning the policyholder does not need to show that  
14 Mr. Li can afford it. That is not a basis to deny a  
15 preliminary injunction. And so that is the reason we didn't  
16 put in Mr. Li's certification.

17 If Your Honor believes it's important to put in that  
18 certification, we will be -- we will gladly do so.

19 THE COURT: Well, I do not think policy, as sound as  
20 it is, is sufficient to trump factual demonstration of  
21 irreparable harm. You do what you think is this your client's  
22 interest. I am not giving advice and that is somewhat off the  
23 cuff, to be candid with you, but just my reaction to what you  
24 said.

25 Let's wrap it up. Who wants to go first? Or have

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1 you said all that you need to say?

2 MR. SCHEIFFER: Let me sum up.

3 Let's take it from the 800-foot level as they say.

4 THE COURT: So the parties are in discussion about  
5 this problem? It is not going to be limited to this case.

6 MR. SCHEIFFER: No. And that is exactly why  
7 WorldCom doesn't apply, because all the parties were before  
8 the court, and that's just not necessarily going to happen  
9 here, okay?

10 U.S. company, U.S. courts, yes, that makes sense.  
11 That's the reason we have these clauses in this type of  
12 policy, Your Honor. And all of the arguments we're having  
13 about forum selection, not the jurisdiction, but the  
14 enforceability under Swiss law, they would have happened  
15 across the street as well, okay? No question. And this is  
16 months down the road since Mr. Li was arrested.

17 We are not saying we're going to the Second Circuit.  
18 That is my client's choice once we advise them. I don't have  
19 authority. It's a threshold issue. I think, quite honestly,  
20 the Stein decision, when they said those circumstances would  
21 be rare -- and there are other courts that have refused  
22 ancillary jurisdiction -- in this exact situation when  
23 nonparties to the criminal action were brought in under  
24 ancillary jurisdiction, they refused it.

25 It's a very dangerous ground we tread on. Not just

1 for an insurance case, but for any international contract.

2 Are we to look at situations now where a director of  
3 a foreign corporation is arrested in the United States, just  
4 like here, that we drag parties to a private contract who  
5 specifically allot what court that will be in, what law will  
6 apply, to a United States court? FIFA, underwriters, they  
7 were not come to this district. We're going to assume that  
8 Mr. Li is innocent, but they were not in this district and  
9 they have not been indicted.

10 The Stein court was very clear about the procedures  
11 and issues and the concerns expressed when a non-party is  
12 brought in. We are talking about a greater fundamental  
13 Pandora's box.

14 Imagine how many foreigners will run to a U.S. court  
15 who have been arrested in the United States for nefarious acts  
16 and claim coverage or claim the benefit of the bylaws of a  
17 foreign corporation, which courts have also rejected in  
18 exercising ancillary jurisdiction.

19 My duty to this Court is to be frank and honest  
20 about concerns with jurisdiction, to bring them to  
21 Your Honor's attention. We did that. We are bringing this to  
22 your attention because of the overall concern.

23 Underwriters has a policy of consenting to personal  
24 jurisdiction. That's not the issue. The issue is the extent  
25 of the Court's authority. Only you can decide that, from the

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1 way I read the law, and I think we are looking at -- I started  
2 off by saying, a legal conundrum. It is, but one that goes to  
3 the integrity of subject matter jurisdiction.

4 Thank you.

5 MS. COHEN: Thank you, Your Honor.

6 Few points.

7 Counsel suggested that there were settlement  
8 discussions going on. There were, Your Honor, but Mr. Li was  
9 not invited to the table. What happened was the carriers were  
10 having discussions with FIFA without Mr. Li being present.  
11 And when we inserted ourselves into those discussions, it was  
12 clear they had no appetite to do anything for Mr. Li.

13 In fact, if this Court refuses to exercise its  
14 discretion and provide ancillary jurisdiction, we will have no  
15 relief. The defendants, all they've done is delay and they  
16 will continue to delay, and they will be in a much bigger  
17 position because we will not be able to get relief for at  
18 least a year. Even counsel has admitted that. There is no  
19 preliminary relief that we can seek from the Swiss court.  
20 Only Your Honor can do that.

21 And on the Stein case, he quotes one line that says  
22 it's rare. Well, this is a unique situation, Your Honor.  
23 This is not only highly complex, but we're dealing with a  
24 situation where we filed back in September, they removed to  
25 Your Honor, and now they want to withdraw and say we might go

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1 to the Second Circuit.

2 THE COURT: It is a little unusual.

3 MS. COHEN: It is very unusual.

4 Let me just finalize the prejudice.

5 Your Honor, my client now is here. He won't even be  
6 able to participate in the coverage suit that's in  
7 Switzerland. So put aside the fact that they are not  
8 prejudiced. My client will be severely prejudiced because he  
9 can't even participate.

10 And so when you factor in the efficiencies and you  
11 factor in that if Your Honor exercises ancillary jurisdiction  
12 and finds that they have to advance the costs, then everything  
13 will fall into place, both settlement discussions with Mr. Li  
14 and I believe with a lot of the other defendants.

15 Thank you, Your Honor.

16 THE COURT: Well, conundrum it is. But we will get  
17 back to you as quickly as we possibly can. Thank you for your  
18 type.

19 Happy holidays.

20 ALL: Thank you, Your Honor.

21

22 (Matter concluded.)

23

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